GROWING A CONSTITUTION

A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION. William N. Eskridge, Jr.[1] and John Ferejohn.[2] New Haven: Yale University Press. 2010. Pp. viii + 582. $85.00 (Cloth).

Leslie Gielow Jacobs[3]

According to the "romantic" tale of constitutional change (pp. 4, 34), our written Constitution created oh, so many years ago, establishes our most important and fundamental rights. Although we all agreed (by proxy) to these commitments originally, the majorities that inhabit the unruly political processes have a nasty tendency to go astray, and implement oppressive practices. In this case, it is up to the Justices, who reside up on high, to gallop in to save the day, interpreting real life meaning into the written words and casting aside injustices. But the Camelot of the Warren Court is no more. The Justices are acting more like anointed monarchs than white knights, refusing to engraft expanded rights for the disempowered onto the Constitution's bare bones text, or worse—and increasingly frequently of late—reaching out under cover of its broadly worded provisions to invalidate specific and significant judgments about distribution of private rights and use of public power reached, refined and embraced by democratic majorities across temporal and geographic boundaries and in spite of apparent ideological divides. Much of the legal academy has been wringing its collective hands for years now. Things have reached such a state that big thinkers such as Dean Larry Kramer and Professor Mark Tushnet have predicted the loss of "We the People" popular sovereignty, and called for stripping constitutional review power from the Court, respectively.[4] In

1. John A. Garver Professor of Jurisprudence, Yale University.
2. Charles Seligson Professor of Law, New York University School of Law.
3. Professor of Law and Director, Capital Center for Public Law & Policy, University of the Pacific, McGeorge School of Law.
4. *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR

their new book, *A Republic of Statutes*, William N. Eskridge, Jr. and John Ferejohn add to this lively conversation of how constitutional change does and should occur. Although they characterize their theory of constitutionalism as "radical" (p. 26), in actuality they counsel a less dramatic response to the pesky problem of activist review by unelected judges: Don't pay so much attention, and maybe they'll stop acting out.

I

Eskridge and Ferejohn present a "nontraditional framework for thinking about American constitutionalism" (p. 1). In the traditional framework, the Constitution is great, judges are good, and the actors in the political process are the shifty and unprincipled bad guys, who must constantly be monitored lest they misbehave. By contrast, the Eskridge/Ferejohn framework puts the democratic process and the political actors who operate within it front-and-center in their explanation of how the really important rights and liberties that impact and improve the lives of real people today get made. While traditionalists avert their gaze from interest groups, politicians, administrative bureaucrats and the haphazard, cobbled-together products that they tend to create, the book's authors stare with undisguised relish. For Eskridge and Ferejohn, the hurly burly, nitty gritty, back-and-forth of day-to-day politics is something to celebrate. In the authors' small-"c" constitutionalism, the products of the political process—statutes, regulations, treaties—are the key texts; legislators, executive officials and legislators, the government actors with the primary power to establish what the words mean; and judges, the ones who must be watched most carefully lest they fail to recognize the fundamentality and legitimacy of the norms that We the People make, as we act alone, or in combinations, through our elected representatives, and in a host of other messy but meaningful kinds of ways.

The authors present the specifics of their theory in the first part of the book through a string of trilogies, which multiply and repeat with the insistency of a Power Point slide show. Democratic constitutionalism requires (1) "popular choice of political leaders," (2) a "normative hierarchy embodying substantive rights," and (3) "institutions and procedures for enforcing the hierarchy and at least some of the rights" (p. 2).

CONSTITUTIONALISM AND JUDICIAL REVIEW (2005); MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000).

Our written Constitution, augmented by the Bill of Rights, accomplished these things. But the words are vague, and the dramatically difficult Article V amendment process means that the primary vehicle for constitutional change cannot be deliberation and decision by We the People, through our many and diverse elected representatives. Instead, constitutional updating must be accomplished through interpretation and pronouncement by unelected judges.

Three problems plague our judge-enforced big-"C" Constitution. First, the Justices are not institutionally situated to duplicate the legitimacy of the impractical constitutional amendment process, the accuracy or wisdom of the judgment reached, or effective enforcement of the result. Second, the norms of the Constitution, as interpreted by the Court, do not apply directly to private action. Because of their limited application, judge-interpreted constitutional rights cannot change the behaviors that most harm the disadvantaged or penetrate deeply into popular culture to change hearts and minds. Third, the Constitution's scant text does not obviously impose duties on governments to create and guarantee the conditions that allow all of the nation's citizens, whatever their particular characteristics or circumstances, to live productive and fulfilling lives (pp. 4–5).

These three "huge limitations" of big-"C" Constitutionalism have channeled the American people toward the small-"c" constitutionalism of defining and refining rights and liberties through legislative and administrative actions. In the "republic of statutes" that the authors describe, new, and potentially positive, rights commitments are made through the political process. They may be fleeting or, according to the small-"c" constitutional process, they may achieve "super" status, which means that, like big-"C" Constitutional norms, they are more fundamental and enduring than ordinary law.

The authors advance three themes about the interaction of small-"c" "super" constitutional products of the democratic processes with big-"C" Constitutional norms (pp. 6–24). First, political process products transform Constitutional baselines (pp. 6–7). Eskridge and Ferejohn distinguish the terse big"C" Constitution from the voluminous and dense products of the political process—statutes, regulations, treaties and executive orders—that together form the "working constitution," which primarily structures how we live, interact and achieve our life possibilities these days. They argue that these products not only

fill in the gaps in a document that provides few specifics relevant to today, but that they are created through a governance process that transcends that which the Constitution created. Specifically, agencies now regulate much of what we do day-to-day. Additionally, state law still structures many of the basic ground rules of core institutions, such the market and family. In these many ways, political actors and the products they create, not judges interpreting Constitutional rights, define and refine core norms of public morality. The authors argue further, pointing to the example of the desegregation obligations imposed by the Civil Rights Act of 1964, that norms created by statute may influence the public's perception of the scope of Constitutional rights, may improve the actual material enjoyment by litigants of their adjudicated Constitutional rights and may also impact the Court's subsequent interpretations of those same Constitutional rights.

The authors' second theme is that structures and norms created through the ordinary political processes may become "entrenched" so that they operate with a force akin to big-"C" Constitutional norms (pp. 7–8). Here, the authors refer to the distinction drawn in Max Weber's theory of power, between that which is based on the authority to command and that which is based on the force of social norms. They claim that laws typically operate within both of these spheres. They acknowledge that big-"C" Constitutional norms have greater authority to command, because, according to the text of the Supremacy Clause, they trump small-"c" constitutional norms. They argue, however, that some norms created through the political process acquire "super" power within the social sphere, which means that they are more resistant to change than ordinary products of the political process and able to exert force to influence behavior beyond their formal legal boundaries.

And the authors press their point further. In this republic of statutes, which they assert that this nation has become, the political process is not only *another* route through which fundamental norms become identified and adopted by the polity, it is the *only* way that really works these days (p. 14). The political process works better than constitutional amendment or judicial pronouncement at establishing and entrenching public norms because it presents the possibility for republican deliberation. The authors set out another three-factor test to

identify the type of deliberation they mean,[5] but, most basically what they are talking about are legal norms that have emerged after the back-and-forth of active engagement with them by many political actors over the course of time.[6] Three types of sub-constitutional law have the potential to undergo the republican deliberation necessary to achieve "super" status. These are (1) state statutory convergences, (2) "ambitious" federal statutes, and (3) transnational agreements and conventions (p. 16).

With respect to federal statutes in particular, enactment in response to popular demand is only the beginning. The process of entrenchment through implementation is crucial to tapping into the deeper, social norm source of power. The entrenchment process usually involves a three-step process. First, the statute's supporters and its administrators must figure out how to implement it effectively, creating evidence that progress has been made. Second, application of the statute must avoid the disasters predicted by opponents, and, better yet, produce gains that win them over. Third, implementation of the statute must expand its constituency. After a subsequent Congress reaffirms what the first one did, modifying the norm or its applications as appropriate in light of the lessons learned through administration, an emerging superstatute comes of age. According to Eskridge and Ferejohn, the small-"c" "constitutional" process of superstatute norm entrenchment is superior to that which can be achieved through the big-"C" process of Constitutional change for three (yes, three) reasons. Superstatute entrenchment is "*institutional,* but without the rigid supermajority requirements imposed by Article V;" it is "*deliberative,* but with the process focused on agencies and legislatures rather than courts;" and it is "*popular,* but with feedback occurring over time" rather than in one big Constitutional showdown (p. 17).

With their third claim, Eskridge and Ferejohn describe what they see as the "productive role" unelected judges can continue to occupy in this brave new republic of statutes that they identify (p. 22). It is "modest," to be sure, but provides a "conceptual payoff" nevertheless (p. 434). According to their theory of small-"c" constitutionalism, deliberation in the democratic process,

5. Republican deliberation must be purposive, dialogic, and accountable to stakeholders (p. 15).

6. The authors describe the political process as the "gradual process of legislation, administrative implementation, public feedback, and legislative reaffirmation and elaboration" (p. 14).

over the course of time and in numerous venues is what identifies new fundamental norms and cements them, and so the authors argue that the Court should look to this deliberation to guide its big-"C" Constitutional interpretations. Indeed, they say it is "high time" other legal theorists saw things this way, too (p. 435). The authors counsel that judicial review should above all be *deliberation-respecting*, which means the state and national deliberative processes should have "significant normative force" when judges evaluate the constitutionality of its products (laws and policies) and where those processes have occurred, the Court generally should defer.[7] As compared to original meaning theories of interpretation, Eskridge and Ferejohn argue that their deliberation-respecting theory provides a more objective and democratically responsive method for judges to apply ambiguous Constitutional text to modern problems. They argue that judges ought to treat norms that have achieved "super" status as precedents, to be studied and presumptively applied to interpret ambiguous Constitutional text (pp. 444–55).

The three parts of the book, each divided into three chapters, present detailed "case"—or, rather, "statute"—studies through which the authors illustrate, explain and defend their themes. In Part I, the authors present their theory of small-"c" constitutionalism.[8] They present the history of three major statutes, which they argue have achieved the "super" status. These are the Pregnancy Discrimination Act of 1978, the Voting Rights Act of 1965, and the Sherman Act of 1890. The authors use these examples to illustrate "norm entrepreneurship" by legislative and executive officials (as opposed to judges), the legitimating deliberation that occurs over time and at many locations in the political process, and the power of superstatute norms to curve legal and social space-time so that they impact behaviors beyond their formal legal commands.

The chapters in Part II address the process of small-"c" constitutional entrenchment. The examples include the Social Security Act of 1935, state statutory convergences in the areas of marriage and family, and the "green constitution" as embodied

7. When Congress has failed to deliberate appropriately, judicial review should be *deliberation-inducing*, which means the Court uses a "soft" means of rebuke, such as statutory interpretation, to send the issue back for the deliberation that was supposed to have occurred (p. 24).

8. They also call this process "administrative constitutionalism," with the explanation that the more accurate label of "congressional-presidential-administrative constitutionalism" would be too long (p. 26).

in the Clean Water Act and the Endangered Species Act. The authors present pages and pages of bills, laws, amendments, regulations, and political gains and setbacks to defend their claim that through this arduous, and often tedious, process, institutions and norms established by statutes and regulations achieve a durability that is analogous to the "entrenchment" that the written text of the Constitution and judicial interpretations of it enjoy. Importantly, Eskridge and Ferejohn acknowledge that some features of the written Constitution, like its bicameralism requirement for enactment of legislation, are entrenched more deeply than norms created through the political process can ever be. They claim, however, that the "super" norms that emerge from the political process gauntlet that they describe are more entrenched than ordinary legislation and a number of judicially interpreted Constitutional rights (p. 165). In the chapter about the environmental statutes, in particular, the authors make a number of points about judicial review of agency action. Most basically, they argue that agency interpretation of federal superstatutes will inevitably be dynamic, and the Court should most often let it happen, so long as it is evident that deliberation occurred.[9] In fact, and "[r]eflecting current practice," the Court should "openly announce deliberation as a plus factor in judicial review" (p. 265).

Part III presents examples to illustrate small-"c" constitutionalism's "great virtue" of adaptability. These examples are the various laws establishing rules relating to money and banking, homosexuality and national security. The authors label this part as presenting cycles of constitutional entrenchment and dis-entrenchment. With respect to the first two examples, they present histories to demonstrate successful dis-entrenchment of an entrenched small-"c" constitutional norm (the United States Banks and the "anti-homosexual constitution," respectively). With respect to national security, they argue that the Bush-Cheney innovations relating to wiretapping and waterboarding were attempted dis-entrenchments that did not stick. Although they promote small-"c" constitutionalism as better than its big-"C" alternative, in

9. Specifically, the authors argue that "the best role for judicial review to play in the modern administrative state is to be *deliberation-inducing* as to normative agency judgments." This means that the Court should defer when an agency has engaged in "model deliberation," and not defer when an agency's interpretation "comes out of nowhere," or otherwise suggests that the agency did not fully consider its result (p. 265).

this part they acknowledge that administrators charged with developing "super" norms can "go[] off track." (p. 305). In these chapters, they provide examples of administrators' missteps, and identify potential checks. Although all three branches possess the power to impose limits on renegade agency action, Eskridge and Ferejohn identify the judiciary as "exceedingly important" in this respect, identifying limits set by state and federal judges on aggressive anti-homosexual policies and on "the administrative culture of torture" as good deeds done (pp. 307–08).

II

The *Republic of Statutes* is a big book, which adds value at a number of levels to the discussion of how the most fundamental commitments that inhabit our laws become made and evolve. One is as history, and it is this that is most difficult to present in a summary. The information jam-packed into the book's many chapters—the ideas, the personalities, the connections that the authors make among activities happening at different times and in different places—is fresh and interesting. It does not hurt, of course, that the examples recount histories that readers have lived through, perhaps participated in, and that sprinkled through the text are names of people readers are likely to have met or know. But that the book is relevant is hardly a criticism. Not everyone is going to agree with the claims the authors make about small-"c" constitutionalism and its authority to rival big-"C" Constitutional norms in life and law. But all readers are going to learn something, and be provoked to reconcile their own assumptions about how "fundamental" law is formed with the very plausible claims that Eskridge and Ferejohn make.

The book is also inspiring. These authors make heroes out of career politicians and bureaucrats. How unexpected is that? Although its story of change through the courts is their antithesis, many of the book's separate stories evoke a feel-good *Road to Brown* glow.[10] The authors personalize their accounts from the get-go by introducing real people, with names and life circumstances, who need the law changed. They then present more real people—private activists, legislators, administrators—who took action to get the job done. Their focus is not on corruption, capture, partisanship, and road blocks (although they

10. THE ROAD TO BROWN (University of Virginia 1989) (depicting the work of Charles Hamilton Huston and the NAACP Legal Defense Fund that led to the decision in *Brown v. Board of Education*).

mention these things). They think government is good and the lawmaking process, by and large, works. The accounts are not all happy talk, but the authors' overall theme of incremental change achieved through hard work and persistence applied through the established structures of governance is on the rosy side of the spectrum of opinions likely to be offered these days.

Eskridge and Ferejohn are going to lose some readers when they talk about entrenchment. It is a tricky term to use to describe products of the ordinary democratic process when it is the quality that usually distinguishes more fundamental "Constitutional" law from those things. The fact is that "entrenched" means "more difficult to change than ordinary law," and even the most super of superstatutes can be modified or repealed by the same processes (set out in Article I) as the lowliest of laws. The authors explain that they mean social, not formal, legal, entrenchment. The question then becomes: what is important about that?

In arguing that the social entrenchment of fundamental norms is highly important, the authors succeed to the extent their ambitions are descriptive. It seems obvious that, given the few words in the Constitution, many of the important norms that structure how people live and interact day-to-day will appear in statutes, and in regulations that refine them. It is not much of a stretch to go further along with the authors to acknowledge that, with respect to many of these norms, a majority of active voters will grow accustomed to them, embrace them as appropriate (for a variety of reasons), and not seek to change them significantly. It also seems likely that these new norms will influence behaviors outside their formal legal ambit, causing unregulated people to conform their conduct out of social pressure, spawning new laws that build on the new norm, or influencing how judges choose to interpret big-"C" Constitutional provisions. This chain of events that defines small-"c" constitutionalism is interesting and adds to the understanding of the role of statutes and products of the political process more generally in influencing the creation and evolution of fundamental norms.

The authors' claim that judges, and the Justices in particular, should identify entrenched norms embodied in "super" products of the democratic process and use them to guide their constitutional decision making, is a tougher sell. It is one thing to look backwards and to claim that some products of the democratic process have established "super" norms, which have had the outside-their-formal-legal-boundaries influences

that the authors claim. It is another, and much more difficult thing to claim that these "super" norms can be identified—objectively—and applied to modern problems as both the norms and the problems are evolving.

Reasonable people are going to disagree about what amount of time passage or back-and-forth deliberation makes a statute "super" and what the level of generality of reading the norm should be. As to the latter point, the authors argue that Justice Scalia's opinion for the Court in *District of Columbia v. Heller,*[11] purporting to rely on "original meaning" to interpret the Second Amendment to guarantee a limited right to possess hand guns in the home, could more legitimately have justified its result based on state and federal laws that regulated guns generally, but consistently failed to restrict gun possession for hunting or self-defense (pp. 438–42). So now it is super-*silence* we are talking about? To be fair, the authors' evidence of how their theory of judicial review is superior to the variations offered by originalists is much richer than can be presented here, and they offer their theory as a better justification for a result that they do not embrace. Nevertheless, the gymnastics required to explain the application of their theory in this example undermine their claim that an objective and predictable method exists to identify "super" norms.

Reasonable people will also disagree about the circumstances under which a "super" state law convergence should be interpreted to occur. The authors argue that the Court's unanimous decision in *Loving v. Virginia*[12] was a correct application of small-"c" constitutionalism, because "all but sixteen states" had repealed their miscegenation laws (and these were largely in the South) (p. 448). As another example, they argue that both the decisions in *Bowers v. Hardwick*[13] and *Lawrence v. Texas*[14] were appropriate because in 1986 (*Bowers*) twenty-four states still criminalized sodomy (p. 363), whereas in 2003, that number had dropped to fifteen (p. 368). Huh? Again, the authors offer detailed evidence that cannot be presented here to support their claims. They point to changes in "public

11. 554 U.S. 570 *passim* (2008).

12. 388 U.S. 1, 12 (1967) (holding that miscegenation statutes violate the Due Process Clause).

13. 478 U.S. 186, 198 (1986) (holding that a state anti-sodomy statute does not violate fundamental rights).

14. 539 U.S. 558, 587 (2003) (overruling Bowers and holding that a state anti-sodomy statute did violate fundamental rights).

opinion" and in other democratic process arenas, and seem to rely as well upon momentum to support their determination that a "super" state law convergence has occurred. But if change is happening, it would seem that the democratic processes are working, which is what the authors prefer. Absent dramatic and systemic blockages impeding fair deliberation in the political process (which is what the authors find to be the "best defense" of the Court's aggressive norm pronouncement in *Brown v. Board of Education*[15] (p. 456)), deliberation-respecting review would seem to require that the Court defer. At the very least, the tipping point for state statutory convergences is not obvious. Unfortunately, but predictably, the indeterminacy creates the same possibility for selective and result-oriented application of small-"c" constitutionalism as exists with the originalist theories it is advanced to replace.

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Eskridge and Ferejohn conclude their book by offering a gardening metaphor. In the "dominant discussion," rights are static, locked inside a document, made by others and for others to apply. For the book's authors, however, the fundamental norms we live by are like plantings, alive and in need of tending. Not everyone will embrace the imagery. It does, however, suggest an axiom that aptly captures the message the authors want to convey: Better to reap what you sow, than be told what to grow. The Justices are unlikely to listen. But they are bit players, after all, in the ongoing drama Eskridge and Ferejohn describe. We the People occupy the lead roles. Maybe their message will germinate.

15. 347 U.S. 483, 496 (1954) (holding that racial segregation in public education violates the Equal Protection Clause).